APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 17, 2010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 08-2080/2393

SCOTT E. MCKENNA,

Plaintiff-Appellee/Cross-Appellant,

v.

P. EDGELL and B. HONSOWETZ,

Defendants-Appellants/Cross-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 04-74546—John Corbett O'Meara, District Judge.

Argued: October 15, 2009

Decided and Filed: August 17, 2010

Before: MOORE, ROGERS, and GIBSON,
Circuit Judges.*

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* The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

COUNSEL

ARGUED: Susan Lumetta, CUMMINGS, McCLOREY, DAVIS & ACHO, P.C., Livonia, Michigan, for Appellants. David R. Parker, CHARFOOS & CHRISTENSEN, P.C., Detroit, Michigan, for Appellee. **ON BRIEF:** Susan Lumetta, CUMMINGS, McCLOREY, DAVIS & ACHO, P.C., Livonia, Michigan, for Appellants. David R. Parker, CHARFOOS & CHRISTENSEN, P.C., Detroit, Michigan, Hugh M. Davis, Jr., CONSTITUTIONAL LITIGATION ASSOCIATES, P.C., Detroit, Michigan, for Appellee.

MOORE, J., delivered the opinion of the court, in which GIBSON, J., joined. ROGERS, J. (pp. 20-27), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Scott E. McKenna ("McKenna") brought suit against two Royal Oak police officers ("the defendants" or "the officers") who responded to a 911 report that McKenna was having a medical seizure and who thereafter allegedly violated his Fourth Amendment rights. The district court rejected the officers' argument for summary judgment based on qualified immunity, and they sought interlocutory appeal. We dismissed the appeal for lack of subject-matter jurisdiction because the officers' arguments for qualified immunity turned on disputed facts. The case proceeded to trial, where the jury awarded McKenna $6,000 for medical bills and $275,000 for pain and suffering. The district court then denied the defendants' motions for

judgment notwithstanding the verdict and for a new trial but reduced the award for pain and suffering to $10,000. The jury and district judge having spoken, the case is before us now on two issues: first, whether the officers were entitled to qualified immunity, and second, whether the remittitur was improper. Because we hold that the jury reasonably could have found a set of facts indicating that the officers acted in an objectively law-enforcement rather than medical-response capacity, we **AFFIRM** the denial of qualified immunity. We also **AFFIRM** the reduction of damages based on the settled doctrine that a plaintiff who accepts a remittitur may not appeal it.

I. BACKGROUND

A. Factual Background

We recounted many of the operative facts in our opinion dismissing the officers' interlocutory appeal from the district court's denial of summary judgment:

> In the early morning of March 18, 2004, Scott McKenna was suffering from a seizure in his home in Royal Oak, Michigan. At that time, McKenna was a single father living with his three daughters, Alexandra, Samantha, and Jessica. Alexandra, his then fourteen-year-old daughter, called 911 and told the dispatcher that she thought her father may be having a seizure or choking. Officers Edgell and Honsowetz were dispatched to assist a man having trouble breathing. The officers arrived before any other

emergency personnel. Alexandra directed the officers to McKenna's bedroom, where they found McKenna lying in bed.

The course of events after the officers entered McKenna's bedroom is disputed. Alexandra testified that she "couldn't see exactly what was going on" for some period, because she was talking to one of the officers. However, she also testified that this period was "for about a minute .... So I was standing there watching it all." According to Alexandra, the officers instructed Scott McKenna to get out of bed and to get dressed. McKenna got up and started to pick up his pants, but then sat back down on the bed and began to lie back down. Alexandra testified that the officers then "picked him up by his hands, and they like pulled him up from the ground and told him to put his pants on." McKenna then sat back down and, according to Alexandra, "was telling them to stop." According to Alexandra, the officers continued to try to get McKenna out of bed while McKenna "just laid back down." Finally, Alexandra testified, the officers handcuffed McKenna's wrists and ankles, and only then did McKenna begin struggling with them.

Contradicting the testimony offered by McKenna's daughter, the officers said that after they found McKenna unresponsive to verbal questioning, Officer Edgell placed his hand on McKenna's upper arm or shoulder to try to

> rouse him. Officer Edgell testified that when McKenna did rouse he immediately became aggressive and violent, pushing them and causing Officer Honsowetz to fall backwards. The officers asserted that it was necessary to handcuff McKenna because of his violent behavior.
>
> Firefighters arrived as the officers were already restraining McKenna. Scott McKenna has no recollection of the events that took place during his seizure.

McKenna v. City of Royal Oak, 469 F.3d 559, 560 (6th Cir. 2006). The parties testified to those facts at trial.

In addition, Alexandra testified that when the officers arrived, one of them asked her whether McKenna was on drugs and whether he had assaulted her. She answered no to both questions. While or just after firefighters and emergency medical personnel placed McKenna on a stretcher and removed him from the premises, the two officers searched through McKenna's bathroom medicine cabinet and the top drawer of his dresser. They testified that they were looking for prescription or illegal drugs. Alexandra testified that the officers threw out the baby teeth of all of his children that her father kept in the cabinet and that they knocked down all of the objects on top of the dresser.

Officer Honsowetz admitted that even in responding to medical emergencies, he is always aware that criminal activity may be involved and he is "always looking to

investigate it." Trial Tr. 2/12/08 at 41 (Document ("Doc.") 108). He testified that he wrote a report explaining that when he responded to McKenna's home, he believed he might be dealing with an intoxicated person, a person on drugs, or a person having a diabetic reaction. At some point during the encounter, Honsowetz ran McKenna's license plate but did not run his information through the Law Enforcement Information Network ("LEIN"), which tracks criminal history and outstanding warrants.

Both parties introduced evidence as to the proper medical protocol for responding to emergency calls. McKenna's witnesses stated that the appropriate response to a medical seizure is not to restrain the subject but rather to clear the area and let the episode run its course. A firefighter testified, "[w]e don't handcuff patients." Trial Tr. 2/19/08 at 72 (Doc. 119). Firefighters and paramedics testifying for the defendants stated that they are trained to initiate physical contact to rouse a nonresponsive subject, to restrain the subject for safety if necessary, and to look for indications in the environment that might explain the subject's condition.

B. Procedural Background

McKenna initially sued the City of Royal Oak, Officers Edgell and Honsowetz, and a third officer, pleading deprivation of civil rights under 42 U.S.C. § 1983 and several state claims. The district court declined to exercise supplemental jurisdiction over the state claims and dismissed the § 1983 claim against the third officer, who was not personally involved in the events of March

18. The court then granted summary judgment for the City based on McKenna's failure to allege facts sufficient to amount to deliberate indifference in training, but it rejected Edgell and Honsowetz's qualified-immunity argument. The court held that the facts could support a Fourth Amendment violation. We agreed with the district court on interlocutory appeal, dismissing the case for lack of subject-matter jurisdiction. *McKenna*, 469 F.3d at 562. The officers moved for summary judgment a second time, arguing that because they had acted in response to a medical emergency, they were qualifiedly immune from suit under *Peete v. Metropolitan Government of Nashville and Davidson County*, 486 F.3d 217 (6th Cir. 2007). The district court denied the motion. It found *Peete* inapplicable because, when viewed in the light most favorable to McKenna, the facts did not make clear "that the police officers were attempting to provide medical assistance." Op. & Order Denying Defs.' Second Mot. for Summ. J. at 6 (Doc. 53).

The case proceeded to trial in 2008, resulting in a jury verdict for McKenna and an award of $6,000 for medical bills and $275,000 for pain and suffering. The district court denied the officers' motion for judgment notwithstanding the verdict and for new trial, in which the officers had again argued qualified immunity, but it granted a motion for remittitur, reducing the pain-and-suffering award to $10,000. As to qualified immunity, the district court held:

> [I]t is clear that a reasonable jury could come to the same conclusion that this jury came to, that is that Plaintiff's Fourth Amendment

> rights were violated. The evidence indicated a search was conducted and a seizure was made, both of which according to Plaintiff's evidence and witnesses were contrary to established procedure in dealing with seizures. It is apparent that the jury gave more credit to Plaintiff's case than it did Defendants' case which is its right. Although the court may disagree with the jury's findings, that alone is not enough to grant judgment notwithstanding the verdict or a new trial.

McKenna v. City of Royal Oak, No. 04-74546, 2008 WL 2831233, at *2 (E.D. Mich. July 21, 2008). The court also expressed concern that the law leaves police uncertain of how to act when responding to a medical emergency; it commented that "it would be of benefit if the Sixth Circuit were to directly address the issue of law enforcement's obligation to the Fourth Amendment when law enforcement acts in a non-law enforcement capacity." *Id.* at *4. The district court denied a motion to reconsider the remittitur and gave McKenna the choice of accepting the reduction or proceeding with a new trial as to both liability and damages. McKenna accepted the remittitur on September 15, 2008. Officers Edgell and Honsowetz now appeal the district court's denial of qualified immunity, and McKenna challenges the remittitur on cross-appeal.

II. ANALYSIS

A. Standard of Review

The officers appeal the district court's orders denying their first motion for summary judgment, second motion for summary judgment, and post-trial motion for judgment notwithstanding the verdict and for new trial under Federal Rule of Civil Procedure 50(b), all of which turned on the issue of qualified immunity. Under these circumstances, we review the final order, which was rendered with the benefit of all evidence presented at trial. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 899 (6th Cir. 2004). We review de novo an order denying a Rule 50(b) motion, with all reasonable inferences drawn for the nonmoving party. *Id.* at 899-900.

In *Champion*, we described the additional considerations that apply when the dispositive issue is qualified immunity. Qualified immunity is a question of law, but "where the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability." *Id.* at 900 (internal quotation marks omitted). "Thus, to the extent that there is disagreement about the facts," such as whether the officers handcuffed McKenna before he showed any aggression, "we must review the evidence in the light most favorable to the Plaintiff[], taking all inferences in [his] favor." *Id.* Here, as in *Champion*, "we are acutely aware that a jury, faced directly with the tasks we cannot undertake, believed the evidence presented by the Plaintiff[]." *Id.*

In his cross-appeal, McKenna appeals the district court's grant of the officers' motion for remittitur and its denial of his motion for reconsideration under Rule 60(b). Remittitur and relief from a judgment or order lie in the discretion of the district court. *See Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 443 (6th Cir. 2000); Fed. R. Civ. P. 60(b). We therefore generally review the district court's reduction of damages for abuse of discretion. *Gibson v. Moskowitz*, 523 F.3d 657, 663 (6th Cir. 2008). "Once a plaintiff has accepted a remittitur order," however, "he cannot appeal it." *Anderson v. Roberson*, 249 F.3d 539, 542 n.2 (6th Cir. 2001).

B. Qualified Immunity

Whether government officials performing discretionary functions are entitled to qualified immunity involves two questions: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009) (internal quotation marks omitted). In accordance with this framework, the officers advance two independent reasons why qualified immunity applies to them: First, as responders to a medical emergency, they assert that they are immune from suit under *Peete*, which held that liability under the Fourth Amendment for torts committed by firefighters, paramedics, and emergency medical technicians ("EMTs") in the process of responding to a medical emergency is not clearly established. Second, the officers argue that McKenna was incapable of submitting to any show of authority, such that

he could not have been "seized" within the meaning of the Fourth Amendment.

1. Whether the Right Was Clearly Established

The defendants' primary argument is that this case is governed by our observation in *Peete* that "there are no cases applying the Fourth Amendment to paramedics coming to the aid of an unconscious individual as a result of a 911 call by a family member." 486 F.3d at 220. In *Peete,* firefighters, paramedics, and EMTs responded to a 911 call reporting that the plaintiff was experiencing an epileptic seizure. *Id.* To stop him from moving, they tied his hands and ankles behind his back and used their bodies to apply pressure to his head, neck, shoulders, arms, torso, and legs. *Id.* They did not take precautions to ensure he could still breathe, and he died shortly after being restrained. *Id.* Emphasizing the defendants' intent to provide medical aid to the plaintiff, the panel stated that the plaintiff's estate's excessive-force claim "looks like a medical malpractice claim." *Id.* at 222. It noted that "improper medical treatment by a government employee, standing alone, does not violate the Fourth or Fourteenth Amendment." *Id.* The court applied the doctrine of qualified immunity because "there is no 'clearly established law' creating federal liability for a constitutional tort" that occurs when paramedics responding to an emergency restrain a person "while trying to render aid." *Id.* at 219. The officers contend that this holding applies here because they, like the defendants in *Peete,* acted in response to a medical emergency.

There are two ways to think about whether *Peete* applies to the facts of the instant case. First, as argued by McKenna, the fact that the defendants here are police rather than medical-care personnel may render *Peete* inapplicable. As a general matter, exposure to liability does not depend merely on the profession of the government actors. It would not be coherent, for example, to say that paramedics who strap a patient to a gurney without medical need, search his home for evidence of a crime, and forward what they discover to the police do not violate the Fourth Amendment, simply because they are paramedics. On the other hand, the fact that a government agent is a police officer clearly matters in some cases—for example, when it bears on the question of whether a person is "seized" under the Fourth Amendment. *See United States v. Mendenhall,* 446 U.S. 544, 554 (1980) (plurality opinion) (explaining that a person is seized when the surrounding circumstances. such as "the threatening presence of several officers" are such that "a reasonable person would have believed that he was not free to leave").[1] The officers urge us to follow the lead of two district courts that have applied qualified immunity to police based on *Peete. See Daniels v. Bowerman,* No. 08-10278, 2008 WL 2743918 (E.D. Mich. July 14, 2008); *Mills v. Hall,* No. 06-15689, 2008 WL 2397652 (E.D. Mich. June 10, 2008). We note that these unpublished lower-court cases are not binding upon us. The instant case, however, does not require us to resolve the question. Instead, we will assume without deciding that *Peete's* holding could extend to defendant police officers.

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1. Of course, McKenna's claim that he was seized is based not on the presence of intimidating officers, but on the fact that they handcuffed him and pinned him down.

A second way to think about *Peete* is that its applicability depends on a defendant's objective function or purpose. *Peete* may stand for the proposition that when a government agent acting in the *role* of a paramedic—any medical-emergency responders[2]—commits an unreasonable search or seizure, it is not yet clearly established that the conduct violates the Fourth Amendment. There is support for this interpretation in the *Peete* panel's opinion. It stated that qualified immunity turns on "the specific purpose and the particular nature of the conduct alleged in the complaint." *Peete*, 486 F.3d at 220. The panel held that the defendants there were protected because they intended only to provide medical aid: "The paramedics did not unreasonably seize [the patient] for the purpose of interfering with his liberty. They responded to [his] grandmother's call that he was experiencing an epileptic seizure and needed medical attention. They were not acting to enforce the law, deter or incarcerate." *Id.* at 222. On this logic, when officers do act to "enforce the law, deter or incarcerate," qualified immunity might not apply. So reasoned the district court in denying the officers' second summary-judgment motion in the instant case: "[T]he police officers here were not necessarily offering medical assistance. Although the police officers were first on the scene and 'first responders,' it is not clear that trying to get someone out of bed and get him dressed constitutes medical assistance." Op. & Order Denying Defs.' Second Mot. for Summ. J. at 6 (footnote omitted).

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2. The defendants here refer to such persons as "first responders." We eschew that term, as it unduly emphasizes the fact that these individuals get to a scene first rather than the fact that they go there to provide medical support—the critical element of their engagement for the purposes of *Peete's* applicability.

We conclude that whether the officers were entitled to qualified immunity depends on whether they acted in a law-enforcement capacity or in an emergency-medical-response capacity when engaging in the conduct that McKenna claimed violated the Fourth Amendment.[3] If the officers acted as medical-emergency responders, then McKenna's claim would amount to a complaint that he received dangerously negligent and invasive medical care. Under a function-dependent view of *Peete*, if any right to be free from such unintentional conduct by medical-emergency responders exists under the Fourth Amendment, it is not clearly established. *Peete*, 486 F.3d at 219. If the defendants acted in a law-enforcement (e.g., investigative or prosecutorial) capacity, however, McKenna's claim does not "look[] like a medical

3. We are mindful of the challenges police officers face when acting as medical-emergency responders. Often, they are the first and only people on the scene. We acknowledge, as the district court did, the harm to the public that could result from officers' overexposure to liability for civil-rights violations. Qualified immunity is itself one way of negotiating the need to allow plaintiffs to seek relief and the need to protect law enforcement: even if officers violate a person's constitutional rights, they will be shielded from suit unless the rights violated were clearly established and a reasonable police officer would have known of them. Moreover, we believe that the framework applied here offers the sensible middle ground sought by the district court: on the current state of the law, police accused of violations like those involved in the instant case receive immunity when they act as medical responders but not when they act in a law-enforcement capacity. To be sure, they may have to convince a jury of the role they objectively played, but the obligation to persuade a jury exists in all cases in which qualified immunity turns on disputed facts.

malpractice claim," *id.* at 222; rather, his claim is that he was subject to an unreasonable seizure and search. It is certainly clearly established that police violate the Fourth Amendment when they handcuff people whom they neither suspect of criminal wrongdoing nor believe to be a danger to themselves or others. *See United States v. Davis*, 514 F.3d 596, 607, 610 (6th Cir. 2008) (noting that an arrest is valid only if based on probable cause that defendant committed a crime); *Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997) ("The Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others."); *cf Marvin v. City of Taylor*, 509 F.3d 234, 248 (6th Cir. 2007) ("[I]t is clearly established that handcuffing an arrestee in an objectively unreasonable manner is a Fourth Amendment violation."). Likewise, a person has a clearly established right to be free from unreasonable searches, including a warrantless search in the absence of exigent circumstances or some other warrant exception. *See United States v. Purcell*, 526 F.3d 953, 960 (6th Cir. 2008).

We stress that whether the officers acted as law enforcement or as medical responders is an objective inquiry. *See Davis v. Scherer*, 468 U.S. 183, 191 (1984) *("Harlow v. Fitzgerald*, [457 U.S. 800 (1982),] rejected the inquiry into state of mind in favor of a wholly objective standard."); *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (noting that the Supreme Court "purged qualified immunity doctrine of its subjective components" in

Harlow).[4] It is not relevant, therefore, whether Officers Edgell and Honsowetz had a law-enforcement or a medical-response intent; the focus must be on what role their actions reveal them to have played.

The issue is then whether this objective determination of the role that the officers played at McKenna's home is for the jury or for the court.[5] We hold that it is properly a jury question because "the legal question of immunity is completely dependent upon which view of the [disputed] facts is accepted by the jury." *Humphrey v. Mabry*, 482 F.3d 840, 846 (6th Cir. 2007) (internal quotation marks omitted) (alteration in the original). The objective character of what role the officers played depends on what

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4. Consideration of purpose or motive is relevant only when it is an actual element of a constitutional claim. *See, e g., Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (citing, inter alia, discrimination under the Equal Protection Clause and retaliation for exercise of First Amendment rights).

5. We note that as a general matter, there is nothing inappropriate about asking a jury to make an objective finding. Indeed, they are often called upon to apply objective tests. *See, e.g., Anton v. SBC Global Servs., Inc.*, 350 F. App'x 39, 42-43 (6th Cir. 2009) (unpublished opinion) (explaining that the jury permissibly applied an objective test, examining the words and conduct of the parties, to interpret a sales-commissions contract). Some of our sister courts have even allowed the issue of whether a police officer committed an objectively reasonable mistake of law to go to a jury. *See Curley v. Klem*, 499 F.3d 199, 208-10 & nn.8-10 (3d Cir. 2007) (citing cases from the Fifth, Ninth, and Tenth Circuits; noting that the First, Fourth, Seventh, and Eleventh Circuits find this approach impermissible; and showing that cases from the Second and Eighth Circuits go both ways).

actually happened in the early-morning hours of March 18, 2004, and on what a medical-emergency responder would have done under the circumstances. The jury heard testimony on both of these factual issues. Firefighter Shawn Lambouris testified that in responding to medical emergencies, "[w]e don't handcuff patients." Trial Tr. 2/19/08 at 72. Both sides introduced evidence about the general protocol that medical personnel follow when dealing with a person having a medical seizure, evidence from which the jury could have determined whether the officers acted in a law-enforcement or medical-emergency-responder capacity.

The dissent insists that the ultimate characterization of the historical facts found by the jury- that is, whether the conduct looked like law-enforcement or medical -emergency-response work—is a legal question for the court. One complication with this approach is that we have sometimes reserved for the jury determinations that appear to be legal in civil-rights suits under the Fourth Amendment. The reasonableness of officer conduct in excessive-force cases is a question for the court. *Scott v. Harris,* 550 U.S. 372, 381 n.8 (2007); *Muehler v. Mena,* 544 U.S. 93, 99 (2005). But we ask the *jury* to determine whether a set of facts amounted to exigent circumstances. *See, e.g., Ewolski v. City of Brunswick,* 287 F.3d 492, 501 (6th Cir. 2002) (noting that "exigent circumstances is normally a question for the jury," but that "where a finder of fact could reach but one conclusion ... the issue may be determined by the trial court as a matter of law" (internal quotation marks omitted)); *Jones v. Lewis,* 874 F.2d 1125, 1130-31 (6th Cir. 1989) ("[W]hether a reasonable police

officer, confronted with the situation facing the officers in this case, could reasonably have concluded that immediate action to arrest [plaintiff] was necessary in order to prevent his escape is not indisputable and, therefore, was a question for the jury."). And, inconsistently, we have at times asked the jury and at times reserved for the court the issue of whether a set of facts provided officers with probable cause. *Compare Parsons v. City of Pontiac*, 533 F.3d 492, 503 (6th Cir. 2008) ("We ultimately conclude that th[e] evidence, when viewed in the light most favorable to [the plaintiff], is *not* susceptible to only one reasonable determination—that the detectives had probable cause to arrest [him]."), *and Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 617 (6th Cir. 2007) ("[T]he jury heard testimony sufficient to support its conclusion that the officers arrested [the plaintiff] with probable cause."), *and Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir. 2000) ("[W]e must determine whether a jury could conclude that a reasonable officer could have believed that the couple had probably committed or were committing a crime. There is substantial evidence supporting each party's position."), *with Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005) ("[T]he jury does not decide whether the facts it has found are legally sufficient to amount to probable cause or entitlement to qualified immunity."), *and Ross v. Duggan*, 402 F.3d 575, 585 (6th Cir. 2005) ("[T]he judgment[] ... that pre-arrest probable cause existed on a given set of

facts ... is a mixed issue of law and fact reviewed by the courts *de novo.*").[6][7]

It may be questioned why we have assigned some Fourth Amendment inquiries in civil suits to the court and others to the jury, but we need not reach into that thicket to resolve the instant case. The objective question in this case involves a highly factual characterization,

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6. In *Ornelas v. United States*, 517 U.S. 690 (1996), the Supreme Court ruled that when reasonable-suspicion and probable-cause determinations are made by a district judge in the context of a motion to suppress in a criminal case, they are to be reviewed by the court of appeals de novo. *Id.* at 699. The Supreme Court did not consider whether those determinations might be for a jury in the § 1983 context. *cf Jones*, 874 F.2d at #1130 (noting the different treatment of exigent circumstances in suppression and civil damages suits), and it is perhaps for this reason that our cases have continued to discuss them as jury issues since *Ornelas*. The dissent makes a thoughtful argument that the lesson of *Ornelas* should be applied in civil suits. As discussed below, however, our resolution of this case does not turn on this issue and we therefore need not resolve it.

7. Note that in these eases, we have not merely said that the jury could find certain facts that would, as a matter of law, amount to exigent circumstances. We have also said that the jury is entitled to determine *whether* a given set of facts satisfies those objective standards. *See, e.g*, *Parsons*, 533 F.3d at 503 (noting that viewing the evidence in the light most favorable to the plaintiff, "jury *could* find that the information known to the detectives when they arrested [him] falls short of this probable-cause standard" (emphasis added)); *Jones*, 874 F.2d at 1130-31 (leaving the issue of whether officers' conduct could be characterized as being in "hot pursuit" of the plaintiff—giving them exigent circumstances—up to the jury).

not a legal concept at the center of Fourth Amendment law like reasonableness in the use of force, exigent circumstances, or probable cause. The law enforcement/medical-emergency responder distinction matters only in the narrow class of cases in which *Peete* might bar suit. And while this question involves more than determining what acts took place, juries are often asked to go beyond the finding of historical facts and to make objective characterizations in their role as factfinders. *See, e.g., Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 376 (6th Cir. 2009) (stating that whether conduct meets reasonable-person standard or rather is negligent is "a determination that is generally left to the jury"); *Clay v. United Parcel Service, Inc.*, 501 F.3d 695, 707 (6th Cir. 2007) (stating that whether harassment is "severe or pervasive" such that it created a hostile work environment in violation of Title VII "is quintessentially a question of fact") (internal quotation marks omitted). Moreover, it is not a determination with which we have any unique experience or expertise, and not one for which we can turn to our case law for guiding principles. Like the jury, we would rely on the evidence about medical-responder conduct adduced at trial. Were we to determine this issue, we would simply be substituting our judgment about the overall character of a set of facts for that of the jury. And while leaving the issue to the jury may lead to varied results, this is true of other objective characterizations left to the jury, as well. As in those cases, we retain the authority to make the determination as a matter of law when a reasonable jury could come to but one conclusion.

McKenna's jury clearly found that the officers had acted in a law-enforcement capacity. The jury concluded "[t]hat defendants Honsowetz and Edgell intentionally committed acts that violated the plaintiff Scott McKenna's federal constitutional rights not to be subjected to an unreasonable search or to excessive or unreasonable force during an arrest." Form of Verdict at 1 (Doc. 85). It found the officers liable after being instructed by the judge as follows: "[I]f you find that the police were not conducting a search for criminal purposes, then the Fourth Amendment does not apply and Plaintiff cannot recover on his claim of unreasonable search." Jury Instructions at 27 (Doc. 86). "Where the purposes [sic] to render aid in an emergency, rather than to enforce the law, the Fourth Amendment does not apply." *Id.* at 28. Both of these instructions were included at the officers' request. *See* Proposed Jury Instructions at 14, 31 (Doc. 82).[8] The defendants offered them with *Peete* in mind, *see id.* at 4, 13, 31 (citing *Peete*), and the district court properly adopted them to account for that case's holding that liability for persons acting in a medical-response capacity is not clearly established.

Accordingly, we must determine whether there existed any set of facts under which a reasonable jury could have found that, objectively, the officers acted in a law-enforcement capacity. We conduct that inquiry with respect to the two alleged violations in this case, the unreasonable seizure of McKenna's person and the unreasonable search of his home, and find sufficient

8. Plainly, under these circumstances the officers cannot argue that the charge did not adequately instruct the jury as to the objective nature of its inquiry.

evidence to support both. We also hold that even if the question of the officers' objective role is viewed as a question for the judge and not the jury, qualified immunity still does not apply. On the most plaintiff-friendly view of the facts that could have been found by the jury, we too conclude that the officers acted in a law-enforcement capacity.

The jury easily could have found the following: The officers arrived at the McKenna residence in response to a 911 call reporting that McKenna might be having a seizure or choking. One of the officers asked Alexandra whether her father was using drugs, whether he had assaulted her, and whether anything like this had ever happened before. The appropriate response to a medical seizure was not to restrain the subject but rather to clear the area and let the episode run its course. Instead of following that procedure, the officers handled McKenna, repeatedly attempted to get him to put on his pants, and tried to force him to rise in the face of his request that they stop. Completely unprovoked by any aggressive or dangerous behavior, they then rolled him over, pinned him on his stomach with their knees, and handcuffed his arms behind his back and his ankles. After McKenna had been taken away to the hospital, the officers searched a dresser drawer in his bedroom and the medicine cabinet in the bathroom. In the process, they knocked down everything on top of the dresser and threw out his children's baby-teeth collection. One of the officers also ran a check on McKenna's license plate.

This view of the facts undoubtedly supports a finding that the officers acted in a law-enforcement capacity,

and we would make the same judgment ourselves. That the episode began with a 911 call and that it ended with a hospital visit rather than an arrest are not the most probative facts. Those facts are to be expected in a medical emergency involving a patient who has not committed a crime. Moreover, those facts mostly involve the conduct of others, not of the defendant officers: Alexandra made the 911 call, and the firefighters took McKenna to the hospital. The meat of the inquiry concerns what happened between the very beginning and the very end—what the officers themselves did.

Like the district court, we fail to see how it serves any medical-emergency-responder purpose to persist in insisting that a medically seizing individual put on his pants. Questioning Alexandra about McKenna's possible drug use, meanwhile, is equally suggestive of an inquiry into the cause of McKenna's medical condition and of an investigation into wrongdoing. It looks more like the latter, however, given that the officer also asked Alexandra about domestic violence. Even so, alone, these questions would make for a very close case. They are more consistent with law-enforcement behavior, however, when viewed against what happened next: the officers handled, subdued, and handcuffed McKenna at the hands and feet without any sign of violence on his part. All together, their treatment of him was consistent with their treatment of a criminal suspect believed to have abused illegal drugs.[9] This

9. In fact, Officer Honsowetz later wrote in a report that he had exactly this scenario in mind during the McKenna incident. Of course, we do not consider that fact in an objective analysis of the officers' conduct.

objective characterization of the officers' conduct provides a law-enforcement purpose for handcuffing McKenna: if an individual is on drugs or otherwise given to unpredictable behavior, restraining him gives the investigating officers greater control over the situation, protects the officers, and minimizes the individual's ability to interfere with their search. *See United States v. Foster*, 376 F.3d 577, 587 (6th Cir. 2004) (holding that it was reasonable for an officer conducting a *Terry* stop and frisk of an individual he believed to be on PCP to handcuff that individual based on the officer's experience that "people on PCP can become extremely violent").[10]

The search conduct is consistent with this law-enforcement posture. Under ordinary circumstances, the officers' search reasonably would be consistent with a quest for clues about McKenna's medical condition, information that would be valuable to his treatment. But coming immediately after the officers handcuffed McKenna without cause instead of letting the medical seizure run its course, the search looks investigatory. Indeed, Alexandra's testimony that the officers knocked down all the items on top of the dresser and threw away the baby-teeth collection is consistent with a rummage for contraband and the indifference of a raid. Their jettisoning

10. If McKenna had lashed out or otherwise posed a physical danger to himself or others, then restraining him would be consistent with medical-responder training and behavior. The dissent seems to recognize this in its second footnote. But if that is accepted, then it is difficult to say that handcuffing McKenna *without* any sign of violence was somehow a "response to McKenna's medical needs," Dissent at 26.

of McKenna's personal effects does not convincingly reflect an urgency for time-sensitive medical information: McKenna had been stabilized by medical personnel and taken to the hospital.

Finally, after all of this, the officers ran a check on McKenna's license plate. Though distinct from a search of the LEIN, a license-plate database search can produce incriminating information and is standard operating procedure in police incidents. *See United States v. Evans*, 581 F.3d 333, 337 (6th Cir. 2009); *United States v. Garrido-Santana*, 360 F.3d 565, 573 (6th Cir. 2004); *United States v. Mansur*, No. 08-3872, 2010 WL 1140996, at *3 (6th Cir. Mar. 25, 2010) (unpublished opinion); *United States v. Swain*, 227 F. App'x 494, 495 (6th Cir. 2007) (unpublished opinion). Certainly there is no self-evident medical-responder valence to such a search.

We note that our conclusion here is consistent with our dismissal of the officers' earlier interlocutory appeal. At that time, we observed that all of the officers' arguments for qualified immunity "rel[ied] on their own disputed version of the facts, not the facts as alleged by McKenna." *McKenna*, 469 F.3d at 561. We lacked jurisdiction to consider the appeal because there existed a set of facts under which the jury could find a violation of clearly established law. Our conclusion today recognizes that the jury did find those facts: it believed McKenna's version of the events and was fully capable of doing so.

The briefing on appeal does suggest one basis for relief that does not ignore the jury's reasonable findings

of fact. We could hold as a matter of law that police officers who are dispatched to a location by a 911 call for medical attention—a fact emphasized by the dissent—always act in a medical-response capacity, regardless of the other facts in the record. This proposal would be an illogical and dangerous rule. It cannot be that an officer receives *Peete* protection simply because he was invited to the scene of a medical emergency. This proposition overlooks the possibility that an encounter that begins as medical in nature may evolve into one that is investigatory. More importantly, such a rule would give officers who respond to 911 calls free rein to rifle through callers' homes in search of incriminating evidence and to physically abuse callers in ways unrelated to anyone's safety. We decline to immunize misconduct of this sort; instead, we allow this case to stand on the judgment of the jury, in whose hands qualified-immunity cases that turn on disputed facts have traditionally rested. *See Brandenburg v. Cureton*, 882 F.2d 211, 215-16 (6th Cir. 1989).

2. Whether There Was a Constitutional Violation

It is clearly a violation of the Fourth Amendment for police officers acting in a law-enforcement capacity to seize a person and search his home without probable cause. *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). The officers do not contend that they in fact had probable cause. This is to be expected, as nothing in the record suggests McKenna or anyone in his family had committed or was committing a crime when the officers arrived. The officers argue instead that the evidence adduced at trial does not

support a finding that McKenna was "seized" within the meaning of the Fourth Amendment. (They do not argue that his home was not searched.)

In *Peete*, the court explained that, objectively, a seizure is marked by "an intentional interference with a person's liberty by physical force or a show of authority that would cause a reasonable person consciously to submit." *Peete*, 486 F.3d at 220-21 (citing, inter alia, *Bennett v. City of Eastpointe*, 410 F.3d 810, 833 (6th Cir. 2005)). The court considered the relevance of a case raised by the plaintiff there, *Green v. City of New York*, 465 F.3d 65 (2d Cir. 2006). In *Green*, the court denied qualified immunity to a fire-department lieutenant who arranged for a nonverbal ALS patient to be transported to the hospital despite the patient's insistence—through coded blinking and a talking computer—that he had recovered from his episode of breathing trouble and that he wanted to remain at home with his family. *Id.* at 71, 83-84. In distinguishing *Green*, the *Peete* court stated, "[u]nlike the instant case, the individual in the *Green* case was conscious and competent and objected to being taken into custody." *Peete*, 486 F.3d at 221. Apparently on the basis of this discussion in *Peete*, the officers argue that McKenna was not seized because he was not conscious during the incident at his home. Appellants' Br. at 38-40.

This argument is unavailing because there was sufficient evidence of McKenna's consciousness. Alexandra, who witnessed almost the entirety of her father's encounter with the police, testified that he pulled away from the officers at one point: "[H]e pulled back. He didn't want

to—he acted as if he didn't want to sit up at all. He just wanted to lay down." Trial Tr. 2/14/08 at 28 (Doc. 110). The officers point to McKenna's complete lack of memory about the incident, but it is possible for a person to be conscious during an experience and yet not remember it. Moreover, Alexandra testified that at one point, her father told the officers to "stop." *Id.* at 30.

Neither *Peete* nor *Green* calls into question the objective finding that the officers seized McKenna in violation of his Fourth Amendment rights. The officers do not contend that McKenna's home was never "searched" under the Fourth Amendment. The record contained ample evidence to support the determination that the officers unreasonably searched the home and seized McKenna. As described above, both actions violated clearly established constitutional rights, and the denial of qualified immunity was appropriate.

C. Remittitur

On July 21, 2008, when the district court announced its intention to remit $265,000 of the jury's $275,000 award for pain and suffering, it offered McKenna the choice between the reduced award and a new trial. McKenna accepted the remittitur on September 15, 2008. The Supreme Court has clearly stated that a plaintiff cannot appeal a remittitur after he has accepted it. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977). McKenna acknowledges this line of cases but argues that the cases were wrongly decided. As we are bound by the Supreme Court, we must deny his cross-appeal.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's rejection of the officers' qualified-immunity claim in denying their motion for judgment notwithstanding the verdict and for new trial and **AFFIRM** the remittitur of damages.

Appendix A

DISSENT

ROGERS, Circuit Judge, dissenting. I agree that the relevant inquiry in this case is whether, viewed objectively, the actions of Officers Edgell and Honsowetz indicated that they acted as law enforcement officers or as emergency medical responders. Because the nature of the officers' actions is a mixed question of law and fact, this court should review the legal aspect of that determination de novo. Under de novo review, Officers Edgell and Honsowetz acted as emergency medical responders, and thus they are entitled to qualified immunity.

Officers Edgell and Honsowetz are entitled to qualified immunity if their activities, objectively viewed, indicate that they were acting as medical responders as opposed to law enforcement officers. Maj. Op. at 9-10 (citing *Peete v. Metro. Gov't of Nashville & Davidson County*, 486 F.3d 217, 219 (6th Cir. 2007)). The jury's determination does not control the legal aspect of this issue. The Supreme Court has held:

> In determining whether a Fourth Amendment violation occurred we draw all reasonable factual inferences in favor of the jury verdict, but as we made clear in *Ornelas v. United States*, [517 U.S. 690, 697-99 (1996)], we do not defer to the jury's legal conclusion that those facts violate the Constitution.

Muehler v. Mena, 544 U.S. 93, 98 n.1 (2005). In *Muehler*, a woman detained during a search of a house pursuant to

a warrant sued the officers who had executed the warrant under 42 U.S.C. § 1983, arguing that "she was detained for an unreasonable time and in an unreasonable manner in violation of the Fourth Amendment." *Id.* at 96 (internal quotation marks omitted). The district court found that the officers were not entitled to summary judgment on the issue of qualified immunity, and the Ninth Circuit affirmed. *Id.* at 97. After a trial, a jury concluded that the plaintiff had been detained in violation of the Fourth Amendment and awarded her $60,000 in damages. *Id.* The Ninth Circuit again affirmed. *Id.* The Supreme Court vacated and remanded the judgment, holding that even if all of the facts were construed in the plaintiff's favor, the defendants were entitled to qualified immunity. *Id.* at 97-98. In doing so, the Court reviewed the application of the qualified immunity legal standards to the facts de novo, even though the appeal was from a jury verdict. *Id.* at 98 n.1.

In the present context, this rule requires this court to defer to the jury's conclusions on factual issues such as whether Officer Honsowetz asked Alexandra McKenna if her father had assaulted her. This rule, however, requires independent appellate review of "whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Ornelas,* 517 U.S. at 696-97 (insertions in original) (quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 289 n.19 (1982)). Here, the relevant standard concerns whether the officers acted as law enforcement officers or as emergency medical responders, and this court must therefore review the answer to this question de novo.

This conclusion is consistent with the policy rationale underlying *Ornelas*. In *Ornelas*, the Supreme Court considered the standard of review applicable to probable cause and reasonable suspicion determinations. 517 U.S. at 695. The Court acknowledged that reasonable suspicion and probable cause "are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* (internal quotation marks omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)) . The Court further noted that these two standards "are not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 695- 96 (internal quotation marks omitted) (quoting *Gates*, 462 U.S. at 232). This same characterization applies to the question of whether Officers Edgell and Honsowetz acted as law enforcement officers or as emergency medical responders; this is also a standard that deals with the factual and practical considerations of everyday life, and it would likewise be difficult to develop neat rules to delineate between law enforcement and emergency medical response. Like probable cause and reasonable suspicion determinations, this question of law enforcement versus medical response is a "fluid concept[] that take[s] [its] substantive content from the particular contexts in which the standard[] [is] being assessed." *Id.* at 696. Even so, de novo appellate review is appropriate for all of these concepts; indeed, such review is "necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* at 697. This is perhaps all the more true here, in the context of a newly enunciated standard. Deference to fact-finders, in contrast, would lead to "varied results" which "would

be inconsistent with the idea of a unitary system of law." *Id.; see also Indmar Prods. Co., Inc. v. Comm'r,* 444 F.3d 771, 785-86 (6th Cir. 2006) (Rogers, J., concurring) (noting the importance of reviewing the legal aspects of mixed questions of law and fact de novo to prevent "inconsistent law" from being "applied to similarly situated persons, even after appeal to a single appellate court").

This court's varying precedents on the standard of review applicable to probable cause and exigent circumstances determinations do not provide a basis for ignoring the Supreme Court's holdings from *Muehler* and *Ornelas.* Mixed questions of law and fact, such as probable cause and exigent circumstances determinations, are sometimes reviewed deferentially—when the relevant dispute concerns the underlying facts—and are at other times reviewed de novo—when the relevant dispute concerns the application of law to the underlying facts. This court's precedents state both of these principles clearly with respect to both probable cause and exigent circumstances determinations. *Hale v. Kart,* 396 F.3d 721, 728 (6th Cir. 2005) ("If disputed factual issues underlying probable cause exist, those issues must be submitted to a jury for the jury to determine the appropriate facts."); *Ross v. Duggan,* 402 F.3d 575, 585 (6th Cir. 2004) (holding in a § 1983 suit that whether "pre-arrest probable cause existed on a given set of facts" is "a mixed issue of law and fact reviewed by the courts de novo" (citing *Ornelas,* 517 U.S. at 696-98)); *Peterson Novelties, Inc. v. Clinton Twp.,* 225 F.3d 659 (Table), 2000 WL 1091487, at *4 (6th Cir. 2000) ("[T]he [district] court's factual findings on the existence of exigent circumstances will be disturbed

only if they are clearly erroneous." (second alteration in original) (internal quotation marks omitted) (quoting *United States v. Johnson*, 9 F.3d 506, 508 (6th Cir. 1993))); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1043 (6th Cir. 1992) ("This court reviews de novo the district court's legal conclusions with respect to the issue of exigency."). At other times, however, we have been less clear about when the underlying issues are legal or factual, and this may have led to some drift of the applicable standard of review between that for legal questions and that for factual questions. *See Indmar*, 444 F.3d at 785-86 (Rogers, J., concurring) (describing how such drift could occur). And in at least one case, we have apparently held that both deferential and non-deferential standards of review apply to the same issue:

> The question of whether a set of historical facts amounts to probable cause is a mixed question of law and fact appropriate for *de novo* appellate review. In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible.

Wrubel v. Bouchard, 65 F. App'x 933, 936 (6th Cir. 2003) (internal quotation marks omitted) (citations omitted).

The clearest example of review-standard drift is in *Jones v. Lewis*, 874 F.2d 1125 (6th Cir. 1989). *Jones* stated simply:

> Although, in a motion to suppress evidence in a criminal case, the factual determination

> whether exigent circumstances existed to excuse a warrantless arrest is a question for the court, when the issue arises in a civil damage suit it is properly submitted to the jury providing, given the evidence on the matter, there is room for a difference of opinion.

Id. at 1130 (citations omitted). In so holding, the court relied upon three other circuit court cases that, properly read, do not support such a flat holding.[1]

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1. In one cited case, *Hindman v. City of Paris, Texas*, 746 F.2d 1063 (5th Cir. 1984), the Fifth Circuit cited its own precedent in explaining that "where facts relied upon to show probable cause in a § 1983 action [for false arrest] are controverted, they must be resolved by the jury before controlling legal principles are applied." *Id.* at 1067 (insertion in original) (internal quotation marks omitted). Thus, the cited case held that the factual aspect of probable cause must be decided by the jury before the legal aspect can be decided by the court. This distinction was omitted when *Hindman* was cited by *Jones*. The same flaw ultimately underlies *Jones'* citation to *Giordano v. Lee*, 434 F.2d 1227 (8th Cir. 1970). *Giordano* stated that "in civil rights actions . . . where a genuine issue of fact on the existence of probable cause for arrest is presented, the question should be submitted to the jury." *Id.* at 1230. *Giordano* cited a Supreme Court case, *Adickes v. S. H. Kress & Co*, 398 U.S. 144 (1970), for this proposition. *Giordano*, 434 F.2d at 1230. But *Adickes* held only that summary judgment was inappropriate in a civil rights case where a purely factual dispute remained contested, 398 U.S. at 157, and thus did not stand for the conclusion reached by *Giordano* that mixed questions of law and fact ought also to be submitted to the jury and reviewed, in both their factual and legal aspects, deferentially. Finally, the third case cited by *Jones*, *Llaguno v Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985), did clearly state that "where the issue [of probable

Outside of the exigent circumstances context, the general principle that we review the legal aspect of mixed questions of law and fact de novo is relatively well preserved. In the probable cause context, we recently outlined the distinction between the legal and the factual aspects of this mixed question of law and fact:

> When no material dispute of fact exists, probable cause determinations are legal determinations that should be made by a court. [Case citations omitted.]
>
> All of these Sixth Circuit cases stand for the proposition that a jury trial is appropriate where reasonable disputes of material fact exist on facts underlying a probable cause determination. However, where only one reasonable reading of the facts is possible, i.e., where the facts that relate to probable cause are not in dispute, the question of probable cause retains its legal character and should be decided by the judge. We admit that some of these Sixth Circuit cases are confusing and many of the factual recitals in them do not lend themselves to a clear understanding of exactly what facts

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cause] arises in a damage suit, it is . . . a proper issue for the jury if there is room for a difference of opinion." But the Seventh Circuit has since overruled this holding of *Llanguno* in light of *Ornelas* and *Graham v. Connor*, 490 U.S. 386 (1989). *Bell v. Irwin*, 321 F.3d 637, 640-41 (7th Cir. 2003). In the Seventh Circuit's words, *Ornelas* and *Graham* stand for the proposition that "[j]udges rather than juries determine what limits the Constitution places on official conduct." *Id.* at 641.

> were in dispute. Nevertheless, the rule that probable cause is a legal question seems clear.
>
> If disputed factual issues underlying probable cause exist, those issues must be submitted to a jury for the jury to determine the appropriate facts. Similarly, with qualified immunity, a court can submit to the jury the factual dispute with an appropriate instruction to find probable cause and qualified immunity if the factual inquiry is answered one way and to find probable cause and qualified immunity lacking if the inquiry is answered in another way. However, the jury does not decide whether the facts it has found are legally sufficient to amount to probable cause or entitlement to qualified immunity.

Hale, 396 F.3d at 728.

But even if we have not always correctly applied *Ornelas* and *Muehler* to other aspects of our Fourth Amendment jurisprudence, we are bound to apply them correctly here. These cases provide two clear holdings: First, appellate courts review the legal aspect of mixed questions of law and fact under the Fourth Amendment de novo. *Ornelas*, 517 U.S. at 696-98. Second, this standard of review applies to § 1983 suits as well as to criminal appeals, and it applies even when an appellate court is reviewing a jury verdict. *Muehler*, 544 U.S. at 98 n.1. We should therefore review the legal aspect of the determination of the nature of the officers' actions de novo.

Appendix A

Viewed objectively in the light most favorable to McKenna, the evidence from trial establishes that Officers Edgell and Honsowetz acted as emergency medical responders. The officers responded to Alexandra's 911 call reporting that her father appeared to be choking and was perhaps having a seizure. When the officers arrived, Alexandra directed them to her father's room. The officers attempted to speak to McKenna but found him unresponsive. Officer Honsowetz then pulled Alexandra aside and asked her whether her father had taken any drugs, whether and where there were any medicines or illegal drugs in the house, and whether anything similar had ever previously occurred. Alexandra responded that her father had not taken any drugs, that the family stored medicines in her father's bathroom cupboard, and that nothing similar had ever previously occurred. Officer Honsowetz also asked Alexandra if her father had tried to hit her, and she responded that he had not.

The officers then asked McKenna to sit up, and they instructed Alexandra to make the same request of her father. McKenna remained unresponsive. The officers eventually forced McKenna to sit on the side of the bed, despite his continued attempts to lie down. Once McKenna was sitting up, the officers asked him to put on his pants. When McKenna did not respond to this request, the officers tried to dress McKenna in his pants. At some point during this period, McKenna mumbled the word "stop." When the officers attempted to stand McKenna up to finish dressing him in his pants, McKenna was able to free himself from the officers' grip; McKenna fell onto the bed, and one of the officers fell backwards towards

McKenna's bedroom dresser. The officers then handcuffed McKenna's wrists and ankles. McKenna's only physical resistance to this point had been his attempts to lie down, and he had not to this point acted in an aggressive manner towards the officers. Once handcuffed, McKenna struggled against his restraints, and the officers held him down on the bed. Soon after the officers had handcuffed McKenna, the first firefighters and Emergency Medical Response personnel arrived at the McKenna residence. McKenna, still handcuffed, was placed on a stretcher, taken downstairs to an ambulance, and then transported to a hospital.

After the arrival of the firefighters and EMS personnel, Officers Edgell and Honsowetz searched McKenna's bathroom cabinet and the top drawer of his bedroom dresser. In searching the bedroom dresser, the officers ousted much of its contents. At some point, the officers requested that their dispatcher run McKenna's license plate. The officers did not run McKenna's information through the Law Enforcement Information Network, which is standard procedure whenever there is suspicion of criminal behavior.

The officers' actions were more consistent with emergency medical response than with enforcing the law. The most general facts are the most probative: the officers arrived in response to a 911 call complaining of a medical emergency, and the results of the officers' response were that McKenna was taken to the hospital in an ambulance and that he received medical treatment. McKenna was never arrested, incarcerated, or charged

with any crimes. *Cf. Mills v. Hall*, No. 06-15689, 2008 WL 2397652, at *8 (E.D. Mich. June 10, 2008). Neither the handcuffing of McKenna nor the search of the bedroom and bathroom is indicative of criminal investigation. The officers' handcuffing of McKenna might not have been an ideal response to McKenna's medical needs, but if we believe Alexandra's testimony that McKenna was not posing any threat to the officers at the time they handcuffed McKenna, the handcuffing also served no plausible investigative purpose.[2] The officers' search of the bathroom cabinet and McKenna's top dresser drawer was consistent with a search for medicines or illegal drugs that might explain McKenna's condition. The officers did not search any locations unlikely to contain medicines or illegal drugs, and their choice to search the bathroom cabinet followed naturally from Alexandra's identification of that cabinet as the likely location of any medicines in the house. The only activity during the entire encounter that might plausibly be viewed as more consistent with a criminal investigation than with a medical response was questioning Alexandra as to whether her father had tried to hit her. But even this question was not clearly

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2. If, contrary to Alexandra's testimony, the handcuffing served the purposes of controlling McKenna's unpredictable behavior and of protecting the officers' safety, then it was not unreasonable.

Firefighter Lambouris's testimony that firefighters do not handcuff patients is not probative of any relevant issue. Firefighters do not handcuff patients because firefighters do not carry handcuffs. They do carry leather restraints, and they use them when necessary.

inconsistent with a medical response, as it might have both assisted the officers in diagnosing the nature of McKenna's condition and alerted them to any possible danger that McKenna might have posed. Even if this question was investigatory, it certainly cannot alone overcome the remainder of the evidence, all of which strongly indicates that Officers Edgell and Honsowetz were acting as emergency medical responders.

Because, objectively viewed, the officers were acting as emergency medical responders, they are entitled to qualified immunity. I would therefore reverse the judgment of the district court.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION FILED JULY 21, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 04-74546
Hon. John Corbett O'Meara

SCOTT E. McKENNA,

Plaintiff,

v.

CITY OF ROYAL OAK, P. CLONAN, PERRY EDGELL and BRIAN HONSOWETZ,

Defendants.

OPINION AND ORDER DENYING MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL AND GRANTING THE MOTION FOR REMITTITUR

Before the court are Defendants' Motions for Judgment Notwithstanding the Verdict, for a New Trial, and for Remittitur. The motions were filed March 18, 2008 and have been fully briefed. For the reasons stated below, this court denies the motions for judgment notwithstanding the verdict and for a new trial, and grants the motion for remittitur.

Appendix B

FACTUAL BACKGROUND

The motions arise out of a March 4, 2008 jury verdict that found Defendants Edgell and Honsowetz (Defendants) liable for $281,000 in damages for violating Plaintiff's Fourth Amendment rights. The facts presented to the jury revolve around the March 18, 2004 response by Defendants to a medical emergency. That day, Plaintiff's 14 year old daughter, Alexandra, called 911 because she thought her father was choking and needed immediate medical attention. What she was in fact describing were signs of a seizure. Alexandra told 911 that her father was making "growling noises" and his teeth were clenched. When she called him by name, her father could not respond. As a result, two Royal Oak Police Officers, Defendants Edgell and Honsowetz (Defendants), were dispatched to Plaintiff's home in Royal Oak.

When they arrived, Defendants found Plaintiff in his bedroom. Defendants stated that when they called Plaintiff by name and gently shook him, he was able to somewhat sit up in his bed and open his eyes, but that Plaintiff had a "wild eyed" look in his face. Defendants testified that they tried calming Plaintiff through verbal assurances and by putting a hand on his shoulder; however, according to Defendants, their words did not seem to register with Plaintiff, and instead, Plaintiff became aggressive. As Plaintiff struggled, Defendants held him on the bed and eventually handcuffed Plaintiff for his own safety and theirs. At about this time, EMS personnel arrived and Plaintiff was sent by ambulance to Beaumont Hospital for treatment. In all, Defendant officers portrayed their

actions as purely medical, a first response to an emergency that arose from Plaintiff's seizure. Paramedics testified that Defendants followed proper protocol by both holding down Plaintiff and in searching for alcohol or drugs that may have caused the seizure.

Plaintiff's view was significantly different. Plaintiff through Alexandra's testimony adds that the Defendant officers took more of a law enforcement posture when they arrived. Defendants asked if Plaintiff was using drugs and if he had assaulted Alexandra. Plaintiff portrayed the actions as non-medical, and investigatory in nature. Defendants ran Plaintiff's license plate, asked the daughter about the possibility of assaults against her and the use of illicit drugs, and searched Plaintiff's bedroom and bathroom for drugs. Plaintiff also cited to expert testimony to support the idea that Defendants' use of restraint was inconsistent with police procedure in medical emergencies.

LAW AND ANALYSIS

A. Standards of Review

In order to grant a judgment not withstanding the verdict, the court must determine that "no reasonable jury could have found for the nonmoving party." *United States v. Alpine Industry*, 352 F.3d 1017, 1022 (6th Cir. 2003). In doing so, this court must view the evidence in a light most favorable to the non moving party. *Id.*; *Wehr v. Ryan's Family Steak Houses*, 49 F.3d 1150, 1152 (6th Cir 1995). Review of a decision in this matter will be done under a de novo standard. *Alpine Industries*, 352 F.3d at 1022.

Appendix B

Fed. R. Civ. P. 59(a)(1)(A) states that a court may grant a new trial for any reason for which a new trial has been granted previously in an action at law in federal court. This court's authority under Rule 59 "is large" *Bell v. Johnson*, 404 F.3d 997, 102 (6th Cir. 2005); however, generally a new trial is warranted under three circumstances: (1) the verdict went against the weight of the evidence; (2) the damages were excessive; or (3) the trial was prejudiced or biased against the moving party. *Holmes v. City of Massillon*, 78 F.3d 1041, 1045-46 (6th Cir. 1996). Where there is sufficient evidence that a reasonable juror could have reached the challenged verdict, a new trial is improper. *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000).

A trial court may grant remittitur of a verdict when, "after reviewing all the evidence in the light most favorable to the awardee, it is convinced that the verdict is clearly excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the judicial conscience of the court." *Mid-Michigan Computer Systems v. Marc Glassman, Inc.*, 416 F.3d 505, 509 (6th Cir. 2005).

B. Judgment Notwithstanding the Verdict and a New Trial are not warranted. Remittitur is warranted.

The difficulty of the jury's verdict is that it leaves law enforcement in a tenuous position. On the one hand, Defendants' attempts to provide medical assistance have left them with a Fourth Amendment violation that found damages in excess of a quarter of a million dollars. On the other hand, what would have happened had the officers stood by and done nothing until paramedics arrived,

or if the seizure was drug induced and the officers had failed to inform treating physicians of this potential issue because they failed to search for drugs? It is rather likely that Defendants would have face a deliberate indifference claim. *Comstock v. McCray*, 273 F.3d 693, 702 (6th Cir. 2001)

Although this quandary inclines this court toward reversing the jury's verdict, it cannot. When viewing the evidence in a light most favorable to the non-moving party, it is clear that a reasonable jury could come to the same conclusion that this jury came to, that is that Plaintiff's Fourth Amendment rights were violated. The evidence indicated a search was conducted and a seizure was made, both of which according to Plaintiff's evidence and witnesses were contrary to established procedure in dealing with seizures. It is apparent that the jury gave more credit to Plaintiff's case than it did Defendants' case which is its right. Although the court may disagree with the jury's findings, that alone is not enough to grant judgment notwithstanding the verdict or a new trial. *See Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000)

That said, the award that the jury made in this case is excessive and it shocks the conscience of this court. The jury award was split into $6,000 for medical damages and $275,000 for pain and suffering. Because Defendants fail to argue the propriety of the $6000 medical damages award, the court assumes that Defendants concede the issue. As to the damages for pain and suffering, it is true that there was testimony that Plaintiff's attitude toward police has changed since this incident; however, Plaintiff

did not miss work or lose wages because of the incident. Plaintiff admitted that overall, he and his family are doing well and his family has since called the Royal Oak Police Department for assistance which suggests at the most a minimal amount of apprehension, but hardly a fear of the police. As for the actual incident, Plaintiff concedes that he has no recollection of it. His only real damage is a subjective fear, again better phrased as apprehension, of the police that still allows him and his family to turn to the police when necessary. The court cannot find a reasonable basis for such a large amount of pain and suffering damages. The "pain and suffering" caused by Defendants' actions is minimal at best, and one must fear what physical damage could have been done had Defendants not acted. In light of the evidence, the court finds that $10,000 is a reasonable amount for pain and suffering. Accordingly, the court will remit $265,000. If the Plaintiff chooses not to accept the remittitur then a new trial will be required.

ORDER AND CONCLUSION

IT IS HEREBY ORDERED that Defendants' motions for judgment notwithstanding the verdict and for a new trial are DENIED. Defendants' motion for remittitur is GRANTED.

The court affirms the jury's medical damages award of $6,000 and reduces the jury's pain and suffering damages award to $10,000.

SO ORDERED.

In conclusion, this order sufficiently addresses the facts and issues of this case, however, it does not necessarily answer the greater question posed to this court: what exactly should the police do in a situation such as this? Plaintiff suggests that the answer lies in *Champion v. Outlook Nashville*, 380 F.3d 893 (6th Cir. 2004) in which the Sixth Circuit affirmed the district court's decision to deny the police qualified immunity and the district court's ruling that police used excessive force to seize a nonverbal autistic adult. Although somewhat germane to this case, the restraints used in *Champion* were much more forceable to the point that they may have caused Champion's death. In this instance the force used merely subdued a seizure victim until paramedics could attend to his needs. Further, the search of McKenna's home was arguably reasonable since those attending to McKenna had no knowledge at the time what caused the seizure. As stated previously, it could have been precipitated by drugs or alcohol.

What Plaintiff would have this court do is treat police officers exclusively as law enforcement agents, holding them strictly to the protections of the Fourth Amendment regardless of their actions or intentions. However, the responsibilities of police officers entail much more than law enforcement. They are public safety officers who at times are asked to give medical attention to citizens. The home search in this case illustrates this function. The court seriously doubts the officers intended to conduct a search of Plaintiff's bedroom and bathroom so they could later arrest him for illegal drugs. Instead, they were in the midst of a medical emergency that could be better addressed if Plaintiff's paramedics and doctors knew the cause of his seizure. That said, this court also

acknowledges that giving police officers free reign in such a situation essentially creates yet another exception to the Fourth Amendment because of such an exception is open to abuse in criminal investigations. This court is of the mind that a middle ground could be found, one in which police officers are granted qualified immunity to take the steps necessary to ensure a citizen's health and medical needs. At the same time however, evidence found during solely non-law enforcement conduct could be excluded. Such a compromise would allow police officers the peace of mind to address non-law enforcement issues while still protecting the Fourth Amendment rights of a citizen.

Given the financial constraints of communities, it is very likely this situation will appear again before this court and others. Rather than submitting it to a jury, it would be of benefit if the Sixth Circuit were to directly address the issue of law enforcement's obligation to the Fourth Amendment when law enforcement acts in a non-law enforcement capacity.

/s/
John Corbett O'Meara
United States District Judge

Date: July 21, 2008

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, July 21, 2008, by electronic and/or ordinary mail.

/s/
William Barkholz
Case Manager

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED SEPTEMBER 21, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Hon. John Corbett O'Meara

Case No. 04-74546

SCOTT E. McKENNA,

Plaintiff,

v.

THE CITY OF ROYAL OAK, a municipal corporation, OFFICER P. CLONAN, BADGE NO. 168, OFFICER P. EDGELL, BADGE NO. 208, OFFICER B. HONSOWETZ, BADGE NO. 173, and POLICE OFFICER JOHN DOES, jointly and severally,

Defendants.

OPINION AND ORDER DENYING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Before the court is Defendants' motion for summary judgment, filed July 12, 2007. This matter has been fully

briefed. The court heard oral argument on September 20, 2007, and took the motion under advisement. For the reasons set forth below, Defendants' motion is denied.

BACKGROUND FACTS

This is Defendants' second motion for summary judgment. With respect to the first motion, the court granted summary judgment in favor of the City of Royal Oak, but denied summary judgment with respect to Plaintiff's claims against the individual police officers. Specifically, the court denied the officers' claim of qualified immunity because the facts underlying that claim were in dispute. The officers appealed; and the Sixth Circuit affirmed. Subsequent to that appeal, the officers filed this motion, claiming that a new Sixth Circuit case requires that summary judgment be granted in their favor. *See Peete v. Metropolitan Govt. of Nashville*, 486 F.3d 217 (6th Cir. 2007). For convenience, the court will restate the facts.

This is an action brought pursuant to 42 U.S.C. § 1983. On March 18, 2004, Plaintiff, Scott McKenna, was suffering from a seizure in his home in Royal Oak, Michigan. He had apparently never had a seizure before. His fourteen-year-old daughter, Alexandra, heard McKenna making "growling" noises and thought he sounded like he was choking. She called 911 and Royal Oak police and emergency medical technicians were dispatched to the home. Royal Oak police officers Edgell and Honsowetz arrived first. Plaintiff's daughter directed them to Plaintiff's bedroom, where they found Plaintiff

lying in bed. According to the officers, Plaintiff's breathing was labored.

Alexandra McKenna testified that one officer asked her some questions about her father's condition, while the other checked on Plaintiff. According to Alexandra, the officers attempted to rouse Plaintiff and to help him get dressed. Pl.'s Ex. D at 15-20.

> The officers were talking to him, asking him if he could get up.
>
> They asked him to get up off his bed.
>
> Q: Did he respond to that in any fashion?
>
> A: Not for a while. He sat up, but he was still like mumbling, and he was still like doing the same things.
>
> * * *
>
> After that, they told him to get his pants on, and he got up. He started picking up his pants, but then he just like sat back down and started laying back down, and the police tried to pick him back up.
>
> They picked him up by his hands, and they like pulled him up from the ground and told him to put his pants on.

* * *

Then he sat back down, and he didn't want them — I can't say that. He rejected what they were doing. He was trying to pull back, and he didn't want the police touching him.

He was telling them to stop.

Q: Could you understand those words?

A: Yeah.

Q: Was he still muttering and growling and going on at the same time?

A: Yes.

Q: Okay. We're at the point where they try to, what, guide him up with his hands?

A: They took his wrists and pulled him up.

* * *

They just tried to put — get his pants on, and he was like — he kept pushing back and like trying not to get them to — for them to — he just didn't want anyone touching him.

He was pulling back from them. So they were trying to pull him up, and he was trying to lay back down.

> Next the police officers kept on trying to pull him up and get him to be standing up, and he just laid back down, and they eventually started handcuffing his wrists and his ankles so he couldn't move. And then he got — he started moving a lot more after that.
>
> * * *
>
> He started trying to move to try to get out of the handcuffs, so he was moving around a lot. His arms he was trying to get out of the handcuffs as well as ankles. And so he just was really moving a lot and the police tried to get him to stop moving.
>
> * * *
>
> They were pressing down on him, so he would stop moving.

Pl.'s Ex. D at 15-19.

The police officers presented a different story. According to the officers, one of them attempted to rouse Plaintiff by gently shaking him. The officers testified that Plaintiff immediately became aggressive and violent, pushing the officers away and causing Officer Honsowetz to fall backwards. Officer Edgell claims that Plaintiff ripped off the officer's clip-on tie and his leather gloves. The officers assert that it was necessary to handcuff Plaintiff because of his violent and aggressive behavior.

Appendix C

When the Royal Oak firefighters arrived on the scene, they also described Plaintiff as "fighting with the police" and "combative and strong." The firefighters strapped Plaintiff to a stretcher and transported him to Beaumont Hospital. After receiving some medication, Plaintiff apparently calmed down. He was diagnosed by the emergency room doctor as having had a "new onset seizure." Plaintiff has no recollection the events that took place during his seizure; he only remembers "waking up" in the hospital.

Plaintiff filed this action against the City of Royal Oak and Officers Edgell, Honsowetz, and Clonan. Plaintiff's complaint asserts claims of assault and battery, deprivation of civil rights pursuant to § 1983, false arrest and imprisonment, and slander. The state claims were remanded to state court, leaving Plaintiff's § 1983 claim. Specifically, Plaintiff contends that his Fourth Amendment rights were violated when he was handcuffed, "arrested," and subjected to excessive force. As noted above, the court has already dismissed the municipal liability claim against the City of Royal Oak.

LAW AND ANALYSIS

The Defendant officers contend that they are entitled to qualified immunity because their actions did not violate Plaintiff's clearly established constitutional rights. "In civil damage actions arising out of governmental officials' performance of discretionary functions, the officials are generally entitled to qualified immunity from suit 'insofar as their conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known.'" *Greene v. Barber*, 310 F.3d 889, 894 (6th Cir. 2002) (citation omitted). In determining whether Defendants are entitled to qualified immunity, the initial inquiry is as follows: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "[I] f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established .... The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-202.

Defendants contend that they are entitled to qualified immunity pursuant to *Peete*. In that case, the defendants were firefighters, paramedics and emergency medical technicians. They were called to a home after the decedent's grandmother called 911. The decedent was having an epileptic seizure. Upon arriving, the defendants restrained the decedent by "using their bodies to apply weight and pressure to his head, neck, shoulders, arms, torso and legs in an attempt to prevent the decedent from moving." *Peete*, 486 F.3d at 220. Shortly after being restrained in this manner, the decedent died.

The Sixth Circuit determined that there was no Fourth Amendment violation, noting that "there are no cases applying the Fourth Amendment to paramedics coming to the aid of an unconscious individual as a result

of a 911 call by a family member." *Id.* at 220. The court also stated that "where the purpose is to render solicited aid in an emergency rather than to enforce the law, punish, deter, or incarcerate, there is no federal case authority creating a constitutional liability for the negligence, deliberate indifference, and incompetence alleged in the instant case." *Id.* at 221.

The Defendant police officers assert that they arrived at the McKenna house as "first responders" and that, pursuant to *Peete*, the Fourth Amendment does not apply to their actions. Defendants argue that they were attempting to help McKenna and were not there in a law enforcement capacity. Although Defendants' argument has some appeal, the court must view the facts in the light most favorable to Plaintiff. Viewing the facts in that light, it is not clear that the police officers were attempting to provide medical assistance. According to Plaintiff's daughter, the officers attempted to get Plaintiff out of bed and get him dressed. Plaintiff resisted and attempted to lie back down. According to the officers (and contrary to Plaintiff's daughter's testimony), Plaintiff then became aggressive and violent and needed to be restrained. Unlike the paramedics in *Peete*, the police officers here were not necessarily offering medical assistance.[1] Although the police officers were first on the scene and "first responders," it is not clear that trying to get someone out of bed and get him dressed constitutes medical assistance. At minimum, it appears that the police officers' motivation

1. In *Peete*, the facts surrounding the paramedics' actions did not appear to be in dispute.

is at issue. Accordingly, the court finds that *Peete* does not apply here. *See also Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900 (6th Cir. 2004) ("[W]here the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.").

Defendants also claim that the Fourth Amendment is not designed to create liability for "inappropriate medical treatment." However, as noted above, it is not clear that the police officers were attempting to render any medical treatment. Therefore, this argument is inapposite.

ORDER

IT IS HEREBY ORDERED that Defendants' July 12, 2007 motion for summary judgment is DENIED.

/s/John Corbett O'Meara
United States District Judge

Dated: September 21, 2007

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, September 24, 2007, by electronic and/or ordinary mail.

/s/William Barkholz
Case Manager

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED OCTOBER 19, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Hon. John Corbett O'Meara

Case No. 04-74546

SCOTT E. McKENNA,

Plaintiff,

v.

THE CITY OF ROYAL OAK, a municipal corporation, OFFICER P. CLONAN, BADGE NO. 168, OFFICER P. EDGELL, BADGE NO. 208, OFFICER B. HONSOWETZ, BADGE NO. 173, and POLICE OFFICER JOHN DOES, jointly and severally,

Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the court is Defendants' motion for summary judgment, filed August 15, 2005. Plaintiff submitted a

response on September 14, 2005; and Defendants filed a reply on September 19, 2005. The court heard oral argument on October 6, 2005, and took the matter under advisement. For the reasons set forth below, the court grants in part and denies in part Defendants' motion.

BACKGROUND FACTS

This is an action brought pursuant to 42 U.S.C. § 1983. On March 18, 2004, Plaintiff, Scott McKenna, was suffering from a seizure in his home in Royal Oak, Michigan. He had apparently never had a seizure before. His fourteen-year-old daughter, Alexandra, heard McKenna making "growling" noises and thought he sounded like he was choking. She called 911 and Royal Oak police and emergency medical technicians were dispatched to the home. Royal Oak police officers Edgell and Honsowetz arrived first. Plaintiff's daughter directed them to Plaintiff's bedroom, where they found Plaintiff lying in bed. According to the officers, Plaintiff's breathing was labored.

Alexandra McKenna testified that one officer asked her some questions about her father's condition, while the other checked on Plaintiff. According to Alexandra, the officers attempted to rouse Plaintiff and to help him get dressed. Pl.'s Ex. 4 at 15-20.

> The officers were talking to him, asking him if he could get up. They asked him to get up off his bed.

Appendix D

Q: Did he respond to that in any fashion?

A: Not for a while. He sat up, but he was still like mumbling, and he was still like doing the same things.

* * *

After that, they told him to get his pants on, and he got up. He started picking up his pants, but then he just like sat back down and started laying back down, and the police tried to pick him back up. They picked him up by his hands, and they like pulled him up from the ground and told him to put his pants on.

* * *

Then he sat back down, and he didn't want them - I can't say that. He rejected what they were doing. He was trying to pull back, and he didn't want the police touching him.

He was telling them to stop.

Q: Could you understand those words?

A: Yeah.

Q: Was he still muttering and growling and going on at the same time?

A: Yes.

Q: Okay. We're at the point where they try to, what, guide him up with his hands?

A: They took his wrists and pulled him up.

* * *

They just tried to put - get his pants on, and he was like - he kept pushing back and like trying not to get them to - for them to - he just didn't want anyone touching him.

He was pulling back from them. So they were trying to pull him up, and he was trying to lay back down.

Next the police officers kept on trying to pull him up and get him to be standing up, and he just laid back down, and they eventually started handcuffing his wrists and his ankles so he couldn't move. And then he got - he started moving a lot more after that.

* * *

He started trying to move to try to get out of the handcuffs, so he was moving around a lot. His arms he was trying to get out of the handcuffs as well as ankles. And so he

> just was really moving a lot and the police tried to get him to stop moving.
>
> * * *
>
> They were pressing down on him, so he would stop moving.

Pl.'s Ex. 4 at 15-19.

The police officers presented a different story. According to the officers, one of them attempted to rouse Plaintiff by gently shaking him. The officers testified that Plaintiff immediately became aggressive and violent, pushing the officers away and causing Officer Honsowetz to fall backwards. Officer Edgell claims that Plaintiff ripped off the officer's clip-on tie and his leather gloves. The officers assert that it was necessary to handcuff Plaintiff because of his violent and aggressive behavior.

When the Royal Oak firefighters arrived on the scene, they also described Plaintiff as "fighting with the police" and "combative and strong." The firefighters strapped Plaintiff to a stretcher and transported him to Beaumont Hospital. After receiving some medication, Plaintiff apparently calmed down. He was diagnosed by the emergency room doctor as having had a "new onset seizure." Plaintiff has no recollection the events that took place during his seizure; he only remembers "waking up" in the hospital.

Appendix D

Plaintiff filed this action against the City of Royal Oak and Officers Edgell, Honsowetz, and Clonan. Plaintiff's complaint asserts claims of assault and battery, deprivation of civil rights pursuant to § 1983, false arrest and imprisonment, and slander. The state claims were remanded to state court, leaving Plaintiff's § 1983 claim. Specifically, Plaintiff contends that his Fourth Amendment rights were violated when he was handcuffed, "arrested," and subjected to excessive force.

LAW AND ANALYSIS

Defendants claim that (1) Plaintiff has failed to establish a cause of action against the individual officers because Plaintiff was not arrested and the officers used reasonable force to restrain him; (2) the officers are entitled to qualified immunity; and (3) the City of Royal Oak is not liable because there is no evidence that the city's policy was the moving force behind the alleged constitutional violations.[1]

I. Fourth Amendment Violations

Defendants claim that there is no Fourth Amendment violation because Plaintiff was not technically "arrested" and that reasonable force was used to restrain him. However, a person need not be "arrested" and transported to the station house to be considered "seized" within the

1. Defendants also argued that Officer Clonan should be dismissed because he was not personally involved with the events at issue here. The parties agreed at the hearing that Officer Clonan should be dismissed without prejudice.

meaning of the Fourth Amendment. A "person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Buchanon*, 72 F.3d 1217, 1223 (6th Cir. 1995) (citation omitted). *See also Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) ("A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'").

In this case, it is undisputed that Plaintiff was handcuffed and restrained by the officers. A reasonable person would not have believed Plaintiff was free to leave at that time. Although Defendants claim that Plaintiff was only restrained so that he was not "free to attack the officers," there are differing accounts of the events that day. Plaintiff's daughter testified that Plaintiff did not "attack" the police, but was merely attempting to remain in bed. Notably, Defendants do not argue that their actions were reasonable even if Plaintiff's version of events is accepted.

"In order to assess the reasonableness of [the officer's] conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.'" *Terry v. Ohio*,

392 U.S. 1, 21 (1968) (citation omitted). Because the facts are disputed, this court is not in a position to determine whether the defendant officers' seizure of Plaintiff was reasonable under the circumstances. These questions of fact preclude summary judgment on the issue of whether Plaintiff's seizure was reasonably necessary to protect the officers' safety, as they claim.

The same is true with respect to Plaintiff's excessive force claim. "Determining whether the force used to effect a particular seizure is 'reasonable' under the circumstances requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *See Graham*, 490 U.S. at 396 (citation and internal quotation marks omitted).

Plaintiff asserts that the officers provoked the situation by forcing the Plaintiff to get out of bed before the EMTs arrived to treat him. Defendants claim that they used reasonable force under the circumstances, because Plaintiff was violent and aggressive. Plaintiff's daughter testified, however, that her father kept trying to get back in bed and did not "attack" the police. Based upon Plaintiff's daughter's account of the events, it may not have been reasonable for the police to forcibly handcuff and restrain Plaintiff. *See Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900-905 (6th Cir. 2004) ("The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted."). Again, Defendants do not cite authority for the proposition that, under Plaintiff's version of events,

the amount of force was reasonable as a matter of law. Accordingly, there are material questions of fact that preclude summary judgment on this issue.

II. Qualified Immunity

In the alternative, Defendants claim that the individual officers are entitled to qualified immunity. "In civil damage actions arising out of governmental officials' performance of discretionary functions, the officials are generally entitled to qualified immunity from suit 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Greene v. Barber*, 310 F.3d 889, 894 (6th Cir. 2002) (citation omitted). In determining whether Defendants are entitled to qualified immunity, the initial inquiry is as follows: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established . . . . The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-202.

As discussed above, taken in the light most favorable to Plaintiff, the facts suggest that Plaintiff's Fourth Amendment rights were violated. Defendants contend, without much analysis, that a reasonable person in their

position would have believed their actions were lawful. However, Defendants' argument hinges on the court's acceptance of Defendants' version of the facts – that Defendants were only acting to restrain a violent and aggressive individual. Defendants do not argue that they are entitled to qualified immunity under Plaintiff's version of the facts of this case. Accordingly, as discussed above, these disputed issues of fact make summary judgment inappropriate on Defendants' qualified immunity claim. *See Champion*, 380 F.3d at 900 ("[W]here the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.").

III. Municipal Liability

Plaintiff claims that the City of Royal Oak is liable under § 1983 because it has a policy or practice of failing to properly train its officers to respond to calls for medical assistance. The standard for liability for failure to train is as follows:

> We hold today that inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* . . . that a municipality can be liable under § 1983 only where its policies are the moving force [behind] the constitutional violation. Only where a municipality's failure to train its employees

> in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city policy or custom that is actionable under § 1983.

City of Canton v. Harris, 489 U.S. 378, 388 (1989).

Plaintiff acknowledges that the officers "have had one course in Epileptic training," although he asserts that "it was apparently inadequate or the officers would not have conducted themselves in the manner they did." Pl.'s Br. at 7. Plaintiff does not appear to meet, however, the high standard of "deliberate indifference" outlined in *Harris*:

> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. It may be, for example, that an otherwise sound program has occasionally been negligently administered. *Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn*

> *the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.* And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

Harris, 489 U.S. at 390-91 (emphasis added). Based on the record before the court, it appears that Plaintiff is merely claiming that the officers here would not have handcuffed or injured him had they been properly trained. This is not sufficient under *Harris*. Accordingly, summary judgment is appropriate in favor of the City of Royal Oak on Plaintiff's municipal liability claim.

ORDER

Therefore, IT IS HEREBY ORDERED that Defendants' motion for summary judgment is GRANTED IN PART with respect to Plaintiff's claim against the City of Royal Oak.

It is further ORDERED that Defendants' motion for summary judgment is DENIED IN PART with respect to Plaintiff's Fourth Amendment and Defendants' qualified immunity claims.

It is further ORDERED that, consistent with the agreement of the parties, Plaintiff's claim against Defendant Officer Clonan is DISMISSED WITHOUT PREJUDICE.

/s/
John Corbett O'Meara
United States District Judge

Dated: October 19, 2005

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED ON OCTOBER 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-2080

SCOTT E. MCKENNA,

Plaintiff-Appellee,

v.

OFFICER P. EDGELL, ET AL.,

Defendants-Appellants.

FILED
Oct 26, 2010
LEONARD GREEN, Clerk

ORDER

BEFORE: MOORE, ROGERS, and, GIBSON,* Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this

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* Hon. John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk